during the course of the day, so that subscribers only got a total of 11.5 hours of original programming (not counting whether any of those particular programs were actually reruns). Other cable networks that cable operators choose to carry show a similar pattern of running infomercials and rerunning programs. For example, the same cable guide on the same day shows that Lifetime carried five hours of infomercials and the Comedy Channel and the Sci-Fi Channel carried four hours each.

The fact is that operators do not base programming decisions solely -- and at the margin, not even primarily -- on the viewing preferences of subscribers. As evidence, we cite as Exhibit 1 the Cable World article mentioned above, in which it is clear that operators are willing to sacrifice any interest subscribers might have in receiving Court TV or the History Channel for the sake of preserving control over every aspect of their systems. As Exhibit 2, we cite our own experience: the cable operators who refuse to carry TELEMIAMI -- the most widely viewed cable-only Hispanic network in the Miami area -- except at the implicit fee rate. The truth is that operators will sacrifice subscriber penetration if that loss is offset by maintaining their market power.

Finally, the industry's argument is with Congress, not with the Commission. The Commission must implement the statute, and the statute says that operators must give up control over a certain number of channels. The loss of control does not directly affect the operator's revenues. Any detriment is purely speculative -- and true only if one presumes that cable operators are always better judges of viewer preferences than anyone else. So long as an operator's marginal costs are covered -- which the presumptive nominal rate proposal would do -- operators are not harmed.

3. If Opportunity Costs are to Include Dropped Channels' Ability to Attract Subscribers and Other Supposed Deleterious Effects on a Cable System, There Must Be an Offset for Value Added by the Leased Access Programming that Replaces it.

In their zeal to claim that the cost/market formula is inaccurate and that leased access programming is detrimental to their systems, cable operators ignore or dismiss the possibility that leased access programming might actually be of some benefit. In TELEMIAMI's case, it is clear that we are adding value to the systems that carry our programming. The Nielsen figures cited above indicate that we are watched by a substantial number of households in the Miami area. Therefore, if it makes sense to include a factor in the leased access rate formula to account for some hypothetical demand effect of changing channels, it also makes sense to include a countervailing factor for the potential positive demand effect that leased access channels might bring. In reality, we believe this is too difficult to measure, if it exists at all. We also believe that the statistical study we suggested earlier would show that leased access does not affect subscriber penetration significantly, if at all. Therefore, the Commission is right to ignore this entire issue as too speculative. But if it does not, the Commission should treat the demand effect issue consistently by allowing the potential positive demand effects of leased access channels.

4. The True Weaknesses of the Cost/Market Proposal are that it is Complicated, Likely to be Abused by Operators, and Overstates Operators' Costs.

We have already noted our concerns regarding the cost/market formula in our initial comments, and repeat them here only to emphasize that not all of the problems with the formula necessarily harm the interests of cable operators. We believe that operators will have the ability to manipulate the calculations because they have sole control over the

relevant information, and because of the complexity of the calculations required by the FNPRM's proposal. We also believe that the formula's assumption that subscriber revenues equal operating costs already overstates operating costs, and probably more than compensates for any of the speculative opportunity demand effect costs operators claim.

Nevertheless, if modified to include the presumptive nominal rate, so that cost calculations would only be needed if an operator challenged the presumptive rate in a proceeding at the Commission. the cost/market formula may represent a reasonable compromise. In any event, the FNPRM's proposal is far more equitable than the implicit fee formula.

C. Maintaining Different Categories of Programming Will Prevent Leased Access from Being Overwhelmed by Home Shopping and Infomercial Programming.

Our proposal will also address another issue that the industry claims troubles it greatly. We agree that the economics of infomercial and home shopping programming are such that they can compete for leased access space more readily because they can afford to pay higher rates. As we proposed in our initial comments, however, the Commission can remedy this simply by keeping the existing categories of programming in place and establishing different rates or channel designation pools, for them.

We oppose, however, TCI's cure for the problem, because it would be worse than the disease. As we discussed earlier, TCI would require higher rates and give operators great flexibility in setting rates for favored categories of programming. This would merely preserve the status quo. Leased access providers of all kinds would still be unable to obtain carriage. We agree that operators should be allowed to negotiate lower rates, in principle,

but they have always had that right and have made very little use of it.[6] The only way to address the issue fairly over the long run is to establish low presumptive rates for the category of advertiser-supported programmers, and to maintain premium and home shopping and infomercial channels as separate categories. Lumping the categories together will artificially inflate the opportunity cost formula, making rates inherently less affordable for advertiser-supported programming.

D. The Presumptive Nominal Rate Approach Does Not Subsidize Leased Access Programmers.

Operators claim that the cost/market formula subsidizes leased access programmers because they would not be required to pay for the lost opportunity costs discussed above. See, e.g., Joint Comments of Cable Television Operators at 12-13. Some programmers argue that leased access programmers would also unfairly benefit because they would not bear the national marketing and promotional costs that the regular networks use to promote their programming. Comments of ESPN at 3. Neither of these claims is true, and leased access would not be subsidized under the cost/market formula or our proposal.

---

[6] TCI's footnote discussing the litigation between TCI and TELEMIAMI is disingenuous, if not downright dishonest. Comments of TCI at 26-27, n.58. TCI claims that it must have the right to set lower rates because it did not have that right before and TELEMIAMI accused TCI of discriminatory treatment in the course of the litigation. TCI never once raised this issue during that litigation, because it was actually never an issue then. We complained of discriminatory treatment not because we objected to TCI's negotiating a lower rate, but because TCI was trying to force us off its system. Simultaneously, TCI was engaged in a sham transaction with another programmer designed to lead the FCC to believe that TCI was not hostile to leased access and was actually carrying another Hispanic leased access programmer. Having served its litigation purpose, that programmer is now off the system -- and, interestingly, recently filed its own complaint with the FCC against TCI.

We have already demonstrated that there are no quantifiable lost opportunity costs not included in the proposed formula. In addition, programmers' argument that leased access programmers are somehow "subsidized" because they do not have to pay marketing and promotional expenses is ludicrous. TELEMIAMI has to spend money to promote its programming, just as any programmer does. We are not a national network, but we still have to convince advertisers to buy time on our channels, and we must convince viewers that we have something worth watching.

In addition, so long as a leased access programmer, unlike other programmers, is paying for carriage, any suggestion of "subsidy" by established programmers is nonsense: the leased access programmer gets no benefit as compared to any other programmer. Indeed, unlike all other programmers, leased access programmers pay for carriage. It is difficult to see how a leased access programmer who is paying the operator -- when other programmers are paid by the operators -- is receiving any sort of "subsidy." To the extent there is any subsidy, it runs to those programmers that receive affiliate fees from the operator. In other words, to use TCI's terminology, it would seem that the "economics" of nonleased access programmers dictates that they be subsidized by operators, since they cannot survive on their own. We are willing to stand on our own feet and live and die by the quality of our programming and our own ability to attract advertisers. We do not need the cable operator to subsidize us so that we can stay in business.

IV. THE COMMISSION MUST REGULATE OTHER TERMS OF CARRIAGE.

As we discussed in our initial comments, the Commission will have to address many issues other than just the rate formula if leased access is to develop properly. We discuss a handful of issues that the cable industry has objected to below.

A. Leased Channels Should Be Awarded on a First-Come, First-Served Basis.

The NCTA and many cable operators oppose the concept of providing carriage on a first-come, first-served basis. NCTA argues that this would contravene the statute, based on a reading of the legislative history, which stated that capacity did not have to be made available on a non-discriminatory basis. In fact, however, operators will be free to discriminate. If a leased access programmer refuses to pay whatever the applicable rate is, or if the parties are unable to agree on the other terms of carriage, operators will be free not to carry those programmers. Once an operator has met its leased access requirement, it will have even greater discretion in dealing with programmers. Until then, however, operators have demonstrated that they will discriminate by refusing to deal with programmers in any way. Congress could not have meant that when it adopted Section 612. It is inconceivable that Congress meant to require operators to set aside some channels for leased access, but also meant to allow operators to refuse to negotiate. The only way to prevent such behavior is to limit the discretion of operators and require them to accept programmers in turn, as they apply for carriage and agree to the terms of carriage.

B. Resale or Subletting of Leased Access Time Should Be Permitted.

We also repeat our belief that resale of leased access time should be permitted, despite the objections of several operators. TCI argues that the statute does not contemplate resale -- but then neither does the statute forbid it. The law is clearly silent on this subject,

and the Commission has the authority to adopt regulations to implement leased access in general.

Some operators object to the concept of resale on the ground that it is not fair for a leased access programmer to profit from the sale of time. So long as the operator is being compensated appropriately and the leased access programmer is complying with all the terms of its lease, however, the operator is being treated fairly. In fact, allowing a separate entity to sublease a channel to others would actually relieve operators of much of the cost and burden of dealing with a variety of small programmers that each lease only enough time for a single program. Thus, allowing a leased access programmer to act as a broker would actually reduce some of the very costs that operators complain about.

Once again, the Commission would be going against the entire trend of telecommunications regulation under the 1996 Act if it does not allow subleasing. Just as the telephone companies are being required to unbundle their systems to encourage competition, cable operators should be required to do the same.

C. Operators Should Be Required to Place Leased Access Programming on the Basic Tier or the CPS Tier with the Highest Penetration.

The cable industry generally opposes placing leased access on any tier that has a significant level of viewership. Operators and programmers have proposed various schemes, such as placement in a special leased access tier, or carriage only as premium channels. These options are designed solely for one purpose -- to kill leased access -- and they should be seen for what they are. If a leased access programmer is not carried on a tier, it will not have a genuine outlet for its programming. If established programmers need widespread tier

carriage to build viewership and survive, it is ludicrous to suggest that leased access could survive without similar tier carriage.

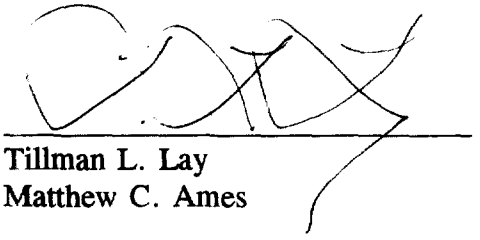
D. Leased Access Rates Should Only Be Adjusted When Permitted by the Terms of a Contract.

We addressed this issue in our initial comments, but would like to add two points. First, if operators are allowed to adjust rates and designated channels annually, operators will invariably insist on one-year contracts. That will make it virtually impossible for leased access programmers to make long-term plans or attract investment. Second, allowing operators to revise rates and redesignate channels annually will provide them with an additional incentive to "game" the system because annual adjustments will limit operators' exposure in choosing high-priced channels to inflate the leased access rate. We fear that operators will select certain high-cost channels to include in the package of channels to be deleted under the cost/market formula, on the assumption that there will not be enough leased access programmers to fill the leased access capacity that year. If so, the operator would never actually face the loss of that channel. In addition, if by some chance enough leased access programmers did appear, thus forcing the operator to actually remove all the existing channels, the programmer would only have to wait a year before it could put that channel back in its lineup. Thus, there would be little risk of long-term harm arising from such attempts at manipulation. The presumptive nominal rate approach would avoid this issue entirely, but if the Commission adopts the cost/market approach as it stands, the Commission should only permit rates to be recalculated when an operator enters into a new leased access contract. Even then, existing contracts should remain unaffected.

Conclusion

The Commission should fulfill its responsibilities under the Cable Act by ensuring the development of leased access as a viable alternative to the exclusive editorial control of cable operators. The Commission should require operators to charge no more than a nominal amount, unless the operator can establish that its actual costs justify a higher rate under the cost-market formula. The Commission should also take definite steps to ensure leased access programmers are not required to comply with burdensome and unreasonable terms and conditions of carriage.

Respectfully submitted,



Tillman L. Lay
Matthew C. Ames

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
1225 Nineteenth Street, N.W., # 400
Washington, D.C. 20036-2420
TEL: (202) 785-0600
FAX: (202) 785-1234

Attorneys for United Broadcasting Corporation, d/b/a TELEMIAMI

May 31, 1996

WAFS1\45499.1\104265-00001